Public Prosecutor v Ebrahim Mirzaie Hj Ebrahim Deh Mokhtar

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–345–02 OF 2014
TENGKU MAIMUN, AHMADI ASNAWI AND ZAMANI A RAHIM JJCA
2 NOVEMBER 2016

Criminal Procedure — Appeal — Appeal against conviction and sentence — Respondent charged with offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act — Trial judge acquitted and discharged respondent — Whether learned trial judge misdirected himself when he revisited his earlier findings — Whether CCTV evidence, DNA profiles and fingerprint impressions were material evidence — Whether respondent's defence afterthought — Dangerous Drugs Act 1952 s 39B(1)(a) & (2)

The respondent was charged with the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act. The prosecution's case was that, the prosecution's witness, PW2 and PW3 saw the respondent pulling a brown bag ('exh 10') and upon further search, it was found that it contained dangerous drugs. Initially, the respondent was acquitted and discharged at the end of the prosecution's case. However on appeal, the Court of Appeal ('the COA') had ordered the respondent to enter his defence. In defence, the respondent contended that the luggage tag bearing his name affixed on the handle of exh 10 was planted by either PW2 or PW3 ('the respondent's defence'). It was also argued that exh 10 was not his and that the bag which he brought from Iran was blue in colour and not brown. The defence was heard before the same learned trial judge and at the end of the defence's case, the respondent was again acquitted and discharged. In essence, the reason given by the learned trial in acquitting and discharging the respondent at both the prosecution and defence's stage was that there was a doubt as to the identity of the bag which contained the impugned drugs. His Lordship found that, based on photographs ('P5A and P5B') exhibited by the prosecution, the colour of the bag was blue and not brown. Dissatisfied with the decision, the prosecution filed the present appeal. The prosecution raised the following grounds: (a) the learned trial judge had erred when he found that there was doubt regarding the identity and colour of the bag; (b) the materiality of the absence of CCTV evidence, DNA profiles and fingerprint impressions; and (c) the learned trial judge had failed to consider that the defence was an afterthought.

Held, allowing the appeal; setting aside the order of acquittal and discharge; convicting the respondent under the charge as proffered against him and sentencing him to death:

(1) The learned trial judge had misdirected himself when he had embarked on an exercise to revisit his earlier findings. Since the COA had ordered the respondent to enter his defence, it must be taken that the COA had ruled that the prosecution had made out a prima facie case against the respondent. The learned trial judge should hence direct his mind on whether the evidence posited by the respondent had created a reasonable doubt to warrant his acquittal (see paras 33–34 & 36–37).

(2) The evidence of both PW2 and PW3 were uncontroverted that they saw the respondent pulling the bag before and at the time they approached the respondent. The bag they saw and seized was a brown coloured bag carrying the 'Sphere' brand name. The documentary exhibits 'Senarai Bongkar', 'Borang Penyerahan Barang/Dokumen OKT' and PW2's police reports all alluded to a brown coloured trolley bag with luggage tag No RB787836, bearing the respondent's name. These documents corroborated the testimonies of PW2 and PW3. The investigating officer, PW5 also testified that the bag he received from PW2 was brown in colour. Based on the evidence, there was more than ample direct evidence to conclude a definite finding that the bag exh P10 was the same bag that was carried by the respondent containing the said drugs. Hence, the materiality of the CCTV evidence, DNA profiles and fingerprint impression, which anyway was only of corroborative value, assumed little significance in the light of such direct evidence (see paras 40, 44–45 & 48).

(3) The respondent's defence was a recent invention. It was never suggested to PW2, PW3 and the PW5, rendering it to be an afterthought incapable of being accorded its due weight. On the other hand PW2 and PW3's evidence on how and where they found the said luggage tag was unshaken to the end. The finding of the learned trial judge in respect of the bag in issue was verily against the weight of evidence which merited appellate intervention (see paras 50–51).

[Bahasa Malaysia summary

Responden dituduh dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 boleh dihukum di bawah s 39B(2) Akta yang sama. Kes pihak pendakwaan adalah bahawa saksi pihak pendakwaan, PW2 dan PW3 melihat responden menarik beg berwarna perang ('eksh 10') atas atas carian selanjutnya, ia didapati yang ianya mengandungi dadah berbahaya. Pada mulanya, responden dibebaskan dan dilepaskan di akhir kes pihak pendakwaan. Walau bagaimanapun atas rayuan, Mahkamah Rayuan ('MR') telah memerintahkan responden untuk memasukkan

pembelaannya. Dalam pembelaan, responden berhujah bahawa teg beg yang memunyai namanya dilekatkan pada pemegang eksh 10 diletakkan oleh sama ada PW2 atau PW3 ('pembelaan responden'). Ia juga dihujahkan bahawa eksh 10 bukan miliknya dan beg yang dibawanya dari Iran adalah berwarna biru dan bukan perang. Pembelaan didengar di hadapan hakim perbicaraan yang sama dan pada akhir kes pembelaan, responden sekali lagi dibebaskan dan dilepaskan. Pada dasarnya, alasan yang diberikan oleh hakim perbicaraan yang bijaksana dalam membebaskan dan melepaskan responden dikedua-dua peringkat pihak pendakwaan dan pembelaan adalah bahawa terdapat keraguan terhadap identiti beg yang mengandungi dadah yang dipersoalkan tersebut. Yang Arif mendapati bahawa, berdasarkan fotograf ('P5A dan P5B') yang diekshibitkan oleh pihak pendakwaan, warna beg adalah biru dan bukan perang. Tidak berpuas hati dengan keputusan, pihak pendakwaan memfailkan rayuan ini. Pihak pendakwaan membangkitkan alasan-alasan berikut: (a) hakim perbicaraan telah terkhilaf apabila dia mendapati bahawa terdapat keraguan berkaitan identiti dan warna beg; (b) ketiadaan bahan keterangan CCTV, profil DNA dan cetakan cap jari; dan (c) hakim perbicaraan yang bijaksana gagal untuk mempertimbangkan bahawa pembelaan adalah sesuatu yang difikirkan semula.

Diputuskan, membenarkan rayuan; mengetepikan perintah pembebasan dan pelepasan; menyabitkan responden di bawah tuduhan seperti yang dikenakan terhadapnya dan menjatuhkan hukuman mati terhadapnya:

(1) Hakim perbicaraan yang bijaksana telah salah arah dirinya apabila dia memulakan tindakan untuk menyemak semula dapatan awalnya. Memandangkan MR telah memerintahkan responden untuk memasukkan pembelaannya, ia mesti diambil kira bahawa MR telah memutuskan bahawa pihak pendakwaan telah membuat kes prima facie terhadap responden. Hakim perbicaraan yang bijaksana sepatutnya mengarahkan mindanya atas sama ada keterangan yang diberikan oleh responden telah mewujudkan keraguan munasabah untuk mewajarkan pembebasannya (lihat perenggan 33–34 & 36–37).

(2) Keterangan kedua-dua PW2 dan PW3 tidak bertentangan bahawa mereka melihat responden sebelumnya menarik beg tersebut dan pada masa mereka mendekati responden. Beg yang mereka lihat dan rampas adalah berwarna perang berlabel 'Sphere' nama jenama. Keterangan dokumentar ekshibit 'Senarai Bongkar', 'Borang Penyerahan Barang/Dokumen OKT' dan laporan polis PW2 kesemuanya merujuk kepada beg troli yang berwarna perang dengan teg beg No RB787836, mempunyai nama responden. Dokumen-dokumen ini menyokong keterangan PW2 dan PW3. Pegawai penyiasat, PW5 juga memberi keterangan bahawa beg yang diterimanya daripada PW2 berwarna perang. Berdasarkan keterangan, terdapat lebih banyak keterangan untuk menyimpulkan dapatan yang tepat bahawa beg eksh P10 adalah

beg yang sama yang dibawa oleh responden yang mengandungi dadah tersebut. Maka, bahan keterangan CCTV, profil DNA dan cetakan cap jari, yang mana hanya mempunyai nilai sokongan, mempunyai kepentingan yang sedikit berdasarkan keterangan langsung sedemikian (lihat perenggan 40, 44–45 & 48).

(3) Pembelaan responden adalah rekaan terbaru. Ia tidak pernah dicadangkan kepada PW2, PW3 dan PW5, menjadikannya sesuatu yang difikirkan kemudiannya tidak dapat diberikan nilai yang sewajarnya. Sebaliknya keterangan PW2 dan PW3 menunjukkan bagaimana dan di mana mereka mendapati teg beg tersebut tidak berubah sehingga akhir. Dapatan hakim perbicaraan yang bijaksana berkenaan beg yang menjadi isu adalah sebenarnya bertentangan berat keterangan yang mewajarkan campur tangan mahkamah rayuan (lihat perenggan 50–51).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (refd)
Pendakwa Raya lwn Sulaiman bin Saidin [2010] 3 MLJ 383, CA (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(2), First Schedule

Appeal from: Criminal Trial No 45A-68 of 2011 (High Court, Shah Alam)

Samihah bt Ghazali (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Muhammad Rafique bin Rashid Ali (Law Practice of Rafique) for the respondent.

Ahmadi Asnawi JCA:

[1] The respondent was charged before the High Court Shah Alam, with the following charge:

Bahawa kamu pada 28 Julai 2010, jam lebih kurang 4.20 petang, di Tuntutan Bagasi C, Balai Ketibaan Antarabangsa, KLIA, di dalam Sepang di dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya jenis Methamphetamine dengan berat 899 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah

A seksyen 39B(2) Akta Dadah Berbahaya 1952.

[2] The respondent was acquitted and discharged at the end of the prosecution's case. On 12 August 2014, the Court of Appeal had allowed the prosecution's appeal in respect of the said acquittal and discharge and ordered the appellant to enter his defence — see order of the Court of Appeal at p 34, *Jld* 1, *rekod rayuan* ('RR'). The defence was heard before the same learned trial judge. At the end of the defence's case, the respondent was again acquitted and discharged. Hence, this appeal before us by the public prosecutor against the said acquittal and discharge.

[3] We allowed the public prosecutor's appeal. We now give our grounds.

THE CASE FOR THE PROSECUTION

[4] On 28 July 2010, PW2 ('Sub Insp Ghazali bin Md Din') and his team were on surveillance duty at the arrival hall of the Main Terminal Building, KLIA, more specifically at Carousel C, Level 3.

[5] At about 4.20pm, PW2 saw the respondent pulling a brown coloured (*warna coklat*) trolley bag ('exh P10') moving towards the exit of the arrival hall. The respondent was also carrying a sling bag ('exh P18').

[6] PW2 approached the respondent and identified himself as a police officer when the respondent walked in front of him. PW2 then inspected his passport and subsequently instructed him to cause the brown coloured bag to be scanned at the scanning machine.

[7] PW2 noticed a suspicious object at the bottom of the brown coloured bag ('the said bag'). He then ordered the respondent to bring the said bag and his sling bag to the narcotics office for further examination.

[8] At the narcotics office, PW2 emptied the said bag. He found the bag was still heavy. He felt a lump (*bonjolan*) at the bottom part of the bag and when pressed, it emitted a crushing sound (*bunyi berderap*).

[9] The respondent appeared restless when PW2 started his inspection. Earlier, at the carousel area the respondent was seen pacing the aisle to and fro, his movements appeared staggered and slow and was constantly looking to his left and right.

[10] PW2 proceeded to cut the bottom part of the said bag. He noticed a hard plastic layer where in the centre of the plastic layer he found a translucent plastic packet containing crystal like substance suspected to be drugs ('exh P33').

[11] PW2 weighed the substance. The weight was 1,325g.

[12] The respondent was arrested and his bags and the drugs were seized. PW2 then marked the exhibits and prepared a search list ('exh P6' at p 202, *Jld* 2, *RR*). PW2 also lodged a police report ('exh P8' at p 206, *Jld* 2, *RR*) and subsequently handed the respondent and the exhibits to the investigating officer, PW5 ('Insp Mohd Firdaus bin Ali') vide *Borang Penyerahan Barang/Dokumen OKT* ('exh P7' at p 204, *Jld* 2, *RR*).

[13] About two hours later, a corrective police report was lodged ('exh P9' at p 207, *RR*) by PW2 when he found errors in his earlier police report.

[14] The chemist, PW4 ('Zulkfeli bin Mohd Edin') found the crystal like substance to contain 899g of methamphetamine ('the drugs'), listed in the First Schedule of the Dangerous Drugs Act 1952 ('the DDA'). His report is exh P36 evinced at p 209, *Jld* 2, *RR*.

THE DECISION OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[15] The learned trial judge found that the prosecution had failed to establish a prima facie case against the respondent on the charge as proferred. He concluded that the prosecution had failed to prove that the bag containing the said drugs was the same bag that was pulled by the respondent at the time the respondent was accosted and later arrested by PW2. At pp 12–13, the learned trial judge stated:

> 17. Malah identiti beg yang dikatakan dibawa oleh 'T' itu juga menunjukkan satu perbezaan warna yang ketara jika dibandingkan dengan gambar yang dikemukakan oleh pihak pendakwaan sendiri. P5(A) dan P5(B) jelas memaparkan kepada kita sebuah beg berwarna biru dan bukan coklat. SP1 dan SP5 bersetuju kedua-dua gambar tersebut menunjukkan sebuah beg berwarna biru gelap, berbeza dengan P10 yang dikatakan berisi dadah itu yang jelas berwarna coklat. SP5 cuba menjelaskan bahawa penataan cahaya telahpun menyebabkan perubahan warna beg tersebut, tetapi ini hanyalah pendapat beliau semata-mata yang tidak disokong oleh apa-apa keterangan lain untuk fakta itu.
>
> 18. Keterangan Pegawai Penyiasat yang menyatakan beliau telah menerima eksibit P10 tersebut daripada SP2 sebuah beg pakaian berwarna coklat, bagaimana pun pada masa yang sama apabila dirujuk kepada eksibit P5(A),

(B) dan (C) beliau juga mengecamkan sebuah beg yang berwarna biru gelap yang mana beliau katakan telah diserahkan oleh SP2 kepadanya.

19. Implikasi daripada keterangan ini menunjukkan satu percanggahan keterangan yang ketara oleh SP5 iaitu beg yang mana satu yang dibawa oleh 'T' sama ada biru atau coklat, lebih ditekankan lagi sama ada eksibit P10 atau beg biru gelap seperti di dalam gambar-gambar P5(A), (B) dan (C)?

20. Percanggahan ini pada pendapat saya memberikan kesan yang negatif kepada kes pihak pendakwaan.

21. Sepatutnya SP5 perlu menjalankan siasatan mendalam berkenaan dengan pakaian-pakaian yang berada di dalam beg P10 tersebut bagi menunjukkan bahawa ia adalah milik 'T' sama ada melalui 'fitting test' ataupun ujian DNA. Ketiadaan keterangan-keterangan tersebut membolehkan mahkamah ini beranggapan bahawa penafian 'T' iaitu 'No, this is not my bag' berkemungkinan juga benar. Tambahan pula 'T' tidak cuba untuk melarikan diri atau sekurang-kurangnya melepaskan beg tersebut, iaitu semasa SP2 memperkenalkan dirinya sebagai 'polis'. Keterangan kes pendakwaan juga menunjukkan 'T' cukup bekerjasama apabila diminta untuk mengimbaskan beg itu, 'T' juga menurut sahaja arahan polis untuk melakukan pemeriksaan mengenai isi kandungan beg itu.

THE RESPONDENT'S DEFENCE UPON BEING ORDERED TO ENTER HIS DEFENCE BY THE COURT OF APPEAL

[16] The respondent gave evidence on oath.

[17] The respondent testified that he was a furniture maker in Iran, earning about 1,000 USD per month.

[18] This was his first trip to Malaysia and his purpose was to find a better paying job to support his family. He chose Malaysia as many of his Iranian friends were already in Malaysia.

[19] He brought a blue coloured trolley bag and a sling bag with him.

[20] On arrival at KLIA, he took his blue coloured bag at Carousel C. On his way out of the arrival hall, he was stopped by a police officer who then instructed him to scan his bag, which he did. Subsequently he was taken to a room with his blue coloured bag. There were many other Iranians in the room. He was instructed by the police to wait in the said room.

[21] After waiting for about 30–40 minutes, the police came back and told him that they found drugs inside his bag, pointing to a brown coloured bag, exh P10.

[22] The respondent protested his innocence by saying repeatedly 'This is not my bag. This is not my bag!'. A

[23] The respondent denied that the brown coloured bag, exh P10, was his and reiterated that he did not carry drugs. He also claimed that the police may have change the luggage tag bearing his name that was affixed to the said bag. B

DECISION OF THE TRIAL JUDGE AT THE END OF THE DEFENCE'S CASE

[24] His Lordship found as a fact that the respondent's defence was grounded upon the denial that the brown coloured bag, P10, was not his and that the bag which he brought from Iran, was blue in colour and not brown as shown in the photographs, exh P5A and P5B. C

[25] Premised upon the said finding, the learned trial judge further stated at pp 26–27, *Jld* 1, *RR*: D

18. 'T' tidak menafikan *tag bag* yang dikemukakan adalah di atas nama beliau dan nombor penerbangan juga adalah sama seperti 'E-Ticket' dan 'Baggage Claim Tag' yang ada padanya dan telah dirampas oleh pihak polis. E

19. Di dalam kes ini pihak pendakwaan bagaimanapun telah gagal untuk mengemukakan keterangan CCTV, DNA dan cap jari bagi menunjukkan 'connection' 'T' dengan eksibit P10 tersebut. Di mana saya berpendapat seandainya bukti-bukti ini dikemukakan ia akan lebih membantu mahkamah ini untuk menemui satu keputusan. F

20. Walaupun dengan ketiadaan bukti-bukti CCTV, DNA profil dan cap jari, yang mana merupakan bukti-bukti sokongan sahaja, tetapi dalam keadaan di mana mahkamah tidak mempunyai pilihan, bukti-bukti ini adalah penting dan mustahak. G

21. Samada pembelaan 'T' di atas sumpah telah berjaya menimbulkan satu keraguan yang munasabah? Malangnya Mahkamah Rayuan di dalam memutuskan 'T' dipanggil membela diri di atas pertuduhan ini telah tidak memberikan apa-apa alasan mengapakah 'T' harus membela diri. H

22. Sepertimana dihujahkan oleh peguambela 'T', bahawa versi pembelaan telah pun ditimbulkan di awal kes pendakwaan lagi, maka adalah menjadi satu beban ke atas pihak pendakwaan untuk menutup apa-apa keraguan atau 'gap' yang ada, kegagalan berbuat demikian membolehkan mahkamah beranggapan sebaliknya. I

[26] Based upon the above findings, the learned trial judge found that the defence had raised a reasonable doubt upon the prosecution's case. Consequently the respondent was acquitted and discharged.

A THE APPEAL BEFORE US

[27] The learned deputy public prosecutor ('the DPP') for the appellant posited the following grounds of appeal:

B (a) the learned trial judge had erred when he found that there is a doubt regarding the identity and colour of the bag;

(b) the materiality of the absence of CCTV evidence, DNA profiles and fingerprint impressions; and

C (c) the learned trial judge had failed to consider that the defence is an afterthought defence.

[28] The learned DPP submitted that the learned trial judge had clearly revisited his earlier findings at the end of the prosecution case upon which he D had acquitted the respondent when again he had alluded to the same issues at the end of the defence to again acquit the respondent. At both stages, it revolved around the colour of the said bag (exh P10) ie whether it was a brown or blue coloured bag.

E

[29] The learned DPP further submitted that the learned trial judge had misdirected himself when he held that there was a doubt as to the identity of the bag in which the colour of the bag is blue and not brown, the same reason for acquitting the respondent at the end of the prosecution's case, when the F Court of Appeal had ruled that the prosecution had made out a prima facie case and ordered the respondent to enter his defence. Plainly, by doing so the learned trial judge had revisited the said ruling of the Court of Appeal.

[30] Premised upon the authority of *Duis Akim & Ors v Public Prosecutor* G [2014] 1 MLJ 49 at p 63; [2013] 9 CLJ 692 at p 709, the learned DPP submitted that since the defence of the respondent was called by this court, the learned trial judge should therefore focussed on whether the defence has cast a reasonable doubt upon the prosecution's case and even if it did not, whether as a whole the prosecution had proved its case beyond a reasonable doubt before H finding the respondent innocent or guilty of the offence as charged.

[31] In respect of the second ground, the learned DPP submitted that even without the CCTV evidence, DNA profiles and fingerprints, the prosecution I had sufficiently proven its case grounded upon the evidence of PW2 and PW3 who both saw the respondent pulling the brown coloured trolley bag and putting it into the scanning machine. In addition, there was also a luggage tag bearing the respondent's name affixed on the bag.

[32] There was also no challenge by the defence that the police had mixed up the bag and it was also not suggested to the prosecution witnesses that the police had planted the luggage tag on the bag, exh P10, rendering the defence to be an afterthought.

OUR DECISION

The first ground

[33] We were with the learned DPP's contention that the learned trial judge had embarked on an exercise to revisit his earlier findings. We have reproduced the learned trial judge's grounds of acquitting the respondent at the end of the prosecution's case in para 15 above and the grounds of acquittal at the end of the defence in para 25. It is apparent that the learned trial judge had revisited his earlier findings and concluded at the end of the defence's case that there were still issues regarding the identity and colour of the bag containing the drugs that was carried by the respondent when this court had ruled and ordered the respondent to enter his defence.

[34] We were in no position to review the said decision of the earlier panel of the Court of Appeal nor were there any necessity to review the same. Since the Court of Appeal had ordered the respondent to enter his defence, it must be taken that the Court of Appeal had ruled that the prosecution had made out a prima facie case against the respondent in respect of the charge levelled against him. It must further be taken that the Court of Appeal must have conducted a maximum evaluation of the evidence available before it ruled that a prima facie case has been made out. Hence, it must also be taken that the Court of Appeal had ruled that the prosecution has adduced credible evidence proving each ingredient of the offence which, if unrebutted or unexplained, would warrant a conviction. And, this must necessarily include the finding that the brown coloured bag, exh P10, was the bag containing the said drugs that was carried by the respondent and later seized by PW2 and his team.

[35] Additionally, following the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, as the respondent can be convicted on the said prima facie evidence, it must be taken that the Court of Appeal must have ruled that the prima facie evidence 'must have reached a standard which is capable of supporting a conviction beyond a reasonable doubt'.

[36] Since the previous panel of the Court of Appeal had ordered the respondent to enter his defence, the learned trial judge should hence direct his mind on whether the evidence posited by the respondent has created a reasonable doubt to warrant his acquittal — see *Duis Akim & Ors v Public*

Prosecutor. In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, the Federal Court put it succinctly:

> [25] In the instant appeal, since all the appellants were called upon by the Court of Appeal to enter on their defence, it must necessarily mean that the Court of Appeal was satisfied that the prosecution had proved all the ingredients of the charge, including the element of common intention, before concluding that a prima facie case had been made out by the prosecution. There was therefore no necessity for us to revisit the issues on whether a prima facie case had been made out. What we need to consider was whether the evidence from the defence had cast a reasonable doubt on the prosecution's case.

[37] The learned trial judge has clearly misdirected himself when he took a different approach altogether as reiterated in the earlier paragraphs — see also *Pendakwa Raya lwn Sulaiman bin Saidin* [2010] 3 MLJ 383.

The second and third grounds

[38] The evidential value of CCTV evidence, DNA profiles and fingerprint impressions as decided by high authority is only corroborative. The learned trial judge correctly appreciated the position. In *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233, the Federal Court stated that:

> Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of sale and there is evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumes little value or significance.

[39] Now, having scrutinised the evidence, we were with the learned DPP that even without the CCTV evidence, DNA profiles and fingerprint impressions, there are sufficient evidence to prove the prosecution's case.

[40] The evidence of both PW2 and PW3 ('DSM Hairudin bin Abdullah') were uncontroverted that they saw the respondent pulling the bag, exh P10, before and at the time they approached the respondent. The bag they saw and seized was a brown coloured bag carrying the 'Sphere' brand name, exh P10. It was the respondent himself who had put the said bag in the scanning machine and it was equally the respondent himself who had carried the said bag to the narcotics office. Both testified that the examination of the said bag was done in the presence of the respondent. These are uncontroverted direct evidence which needs no further support for its sustenance.

[41] PW2 marked the said bag with the letter 'G', the date 28 July 2010 and affixed his signature thereon. In court he identified the same markings on the bag exh P10 as the markings he had made and identified the said bag, exh P10, as the bag carried by the respondent through the said markings. This was not challenged. PW2 and PW3 also denied that the colour of the said bag was blue and not brown.

[42] PW2 also noticed the luggage tag affixed to the handle of the said bag. It bore the respondent's name. He also identified the said bag through this luggage tag. This was also not challenged. On the absence of the said luggage tag in the photographs exh P5(A)–(B), he said at p 57, *Jld* 1, *RR*:

> ... gambar ini diambil dalam kedudukan beg melintang ia tidak dapat dilihat dan sekiranya diambil dari kepala beg ia dapat dilihat dengan jelas.

[43] In addition PW2 also identified the cut he had made at the bottom of the bag, which is also visible in the photographs. He also said that the markings he had made on the said bag is also visible in the photograph, exh P5(C).

[44] The documentary exhibits *Senarai Bongkar* ('exh P6'), *Borang Penyerahan Barang/Dokumen OKT* ('exh P7') and PW2's police reports ('exhs P8–P9') all alluded to a brown coloured trolley bag with luggage tag No RB787836, bearing the respondent's name 'Ebrahim Mirzaei'. These documents corroborated the testimonies of PW2 and PW3.

[45] The investigating officer, PW5, testified that the bag he received from PW2 was brown in colour and that he had marked the said bag with the markings 'F' and affixed his signature thereon. He identified the said bag exh P10, as the bag he had received from PW2 from the said markings he had made and affixed. He said that the markings 'G' and date 28 July 2010 were PW2's markings. He also identified PW2's signature affixed on the said bag. He also noticed the cut mark at the bottom of the bag, which he said was done by PW2. PW5's evidence was also uncontroverted.

[46] On the colour of the said bag, exh P10, which appeared blue in photographs exhs P5(A) and P5(B), PW5 at p 93, *Jld* 1, *RR*, said:

> Memang saya tidak ada sebarang latihan atau kelayakan tetapi berdasarkan pengalaman saya bertanyakan kepada kedai gambar bahawa perkara ini mungkin boleh terjadi disebabkan pantulan cahaya yang selalunya menggunakan kamera yang mempunyai negatif ...

[47] PW5 may not be an expert in photography but his explanation is, however, probable in the absence of any other explanation. It does make sense as the photograph of the said bag in exh P5(9) appeared brownish in colour.

Nevertheless, PW5 reiterated, at p 94, of the same *Jld*:

> S: Walaupun terdapat perbezaan dari segi warna, adakah beg dalam gambar tersebut merupakan beg yang sama yang diterima dari SM Ghazali dan beg yang sama dalam Mahkamah pada hari ini?
>
> J: Ya.

[48] Based upon the evidence enumerated above, there were more than ample direct evidence to conclude a definite finding that the bag exh P10 was the same bag that was carried by the respondent containing the said drugs. Hence, the materiality of the CCTV evidence, DNA profiles and fingerprint impression, which anyway is only of corroborative value, assumed little significance in the light of such direct evidence. The learned trial judge appeared to have ignored and rejected the testimonies of PW2, PW3 and PW5 in respect of the same without assigning any reason or reasons thereto, an imperative exercise in the evaluation of witnesses, more so when the evidence of principal witnesses are rejected.

[49] The respondent said that there may be a mixed up of the bag by either PW2 or PW3. He also acknowledged that the luggage tag bearing his name was affixed on the handle of the said bag. However, he contended that the same was planted either by PW2 or PW3.

[50] We agreed with the learned DPP that this defence is a recent invention. It was never suggested to PW2, PW3 and the investigating officer, PW5, rendering it to be an afterthought incapable of being accorded its due weight. On the other hand PW2 and PW3's evidence on how and where they found the said luggage tag was unshaken to the end.

[51] In the final analysis, we were of the firm view that the findings of the learned trial judge in respect of the bag in issue is verily against the weight of evidence. It merits our appellate intervention.

CONCLUSION

[52] We found there were merits in the appeal lodged by the public prosecutor. Hence we allowed the appeal. The order of acquittal and discharge of the respondent by the learned trial judge at the end of the defence's case is set aside and substituted with a conviction under the charge as proffered against him. Correspondingly, the respondent is sentenced to suffer the death penalty under s 39B(2) of the DDA, by hanging according to law.

Appeal allowed; order of acquittal and discharge set aside; respondent convicted under charge as proffered against him and sentenced to death.

Reported by Dzulqarnain Ab Fatar